National Labor Relations Board Weekly Summary of NLRB Cases

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Aluminum Casting & Engineering Co., Inc. (30-CA-12855, et al.; 349 NLRB No. 18) Milwaukee, WI Jan. 31, 2007. Chairman Battista and Members Schaumber agreed with the administrative law judge that the backpay due to employees, who were not granted a wage increase in 1995 as a result of the Respondent's misconduct, should be limited to 1995. Member Walsh dissented in part. [HTML] [PDF]

In a decision reported at 328 NLRB 8 (1999), the Board found that the Respondent violated Section 8(a)(3) and (1) of the Act by withholding an annual across-the-board wage increase in 1995 because employees voted for Electrical Workers (UE). The Board ordered the Respondent to make whole the unit employees who were employed in 1995 for the annual wage increases they would have received in "1995 to date." On appeal to the Seventh Circuit, the Respondent argued that the Board's Order was overbroad and that backpay should be limited to 1995, the year that the wage increases were unlawfully withheld. In enforcing the Board's Order in relevant part, the court acknowledged that the Respondent's argument could have merit, if the Respondent established requisite facts to support limiting the remedy in compliance. *NLRB v. Aluminum Casting & Engineering Co.*, 230 F.3d 286, 295 (7th Cir. 2000).

Chairman Battista and Member Schaumber agreed with the judge that the General Counsel properly relied on a 3-year representative period in calculating the across-the-board wage increase for 1995, that the Respondent could not rely on a wage survey conducted in 2003 to determine whether an increase would have been granted in 1995, and that the unlawfully withheld 1995 wage increase was 25-cent-per hour. The judge rejected the General Counsel's argument that the 1995 increase should be built into the 1995 employees' base wages for subsequent years, so that they would receive 25 cents for every hour worked from the beginning of the backpay period until their employment ended or the backpay period was concluded.

Chairman Battista and Member Schaumber agreed with the judge that "carrying forward" the 1995 increase into the base pay of the 1995 employees in subsequent years does more than compensate for the unlawful conduct of 1995. They decided it would provide the 1995 employees a windfall at the expense of later hired unit employees, which is inconsistent with Board law and the Act's remedial purposes. The Chairman and Member Schaumber found that the Respondent showed that the 25-cent increase would not have continued into 1996 and beyond because in 1996 the Respondent lawfully changed from an across-the-board system to a merit pay system that is based upon individual performance.

Member Walsh decided, in agreement with the General Counsel and the Charging Party, that to make the employees whole the Respondent must pay them 25 cents each hour worked since the Respondent unlawfully withheld the wage increase. He stated: "The rationales offered by the judge and the majority are premised on the conclusion that, in 1996, the Respondent implemented new merit-based *wage rates*, as opposed to merely implementing a new system of merit-based *wage increases*. . . . [T]his conclusion is erroneous; indeed, it is pure fiction."

(Chairman Battista and Members Schaumber and Walsh participated.)

Hearing at Milwaukee, Aug. 25-26, 2003. Adm. Law Judge Bruce D. Rosenstein issued his decision Nov. 14, 2003.

Comar, Inc. (4-CA-28570, 33903; 349 NLRB No. 33) Buena, NJ Feb. 2, 2007. The Board upheld the administrative law judge's decision and found that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to provide Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers with requested information that is relevant and necessary for the Union to fulfill its role as the collective-bargaining representative of unit employees and by unreasonably delaying the provision of information requested by the Union. [HTML] [PDF]

The Board ordered the Respondent to pay \$2,625,663.789 in backpay. This obligation includes payments to named individuals in amounts ranging from \$697.86 to \$196,744.89, plus interest, for the backpay period up through Dec. 31, 2004. It also includes payments to named individuals in amounts ranging from \$917.60 to \$48,136.32, plus interest, as a result of the Respondent's relocation of its applicator division from Vineland, NJ to its nonunion facility in Buena, NJ. The amounts owed represent the Respondent's backpay obligation as of the Board's most recent compliance specification, which covers the beginning of the Respondent's backpay obligation in 1999 through the fourth quarter of 2004. The Board noted, as did the judge, that the Respondent's backpay obligation continues to run, with certain exceptions as set forth in the compliance specification. Interest will continue to accrue to the date of payment pursuant to the Board's Order.

This proceeding consolidates a compliance specification with a complaint alleging unfair labor practices. In an earlier decision, the Board affirmed the administrative law judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union concerning the effects on employees of the relocation of its applicator division from Vineland, NJ to Buena, NJ. 339 NLRB 903 (2003). The Respondent filed a petition for review with the U.S. Court of Appeals for the D.C. Circuit. On May 19, 2004, the court denied the petition and enforced the Board's Order in its entirety. 111 Fed.Appx. 1 (2004). Subsequently, the Regional Director issued a compliance specification alleging the amounts due under the terms of the Board's order and a complaint alleging that the Respondent violated Section 8(a)(5) and (1) following the hearing in the earlier proceeding by refusing to provide requested information about nonunit employees and by delaying the provision of requested information regarding unit employees.

(Chairman Battista and Members Liebman and Walsh participated.)

Hearing at Philadelphia, Nov. 2-4, 2005. Adm. Law Judge Paul Bogas issued his decision April 3, 2006.

Delmas Conley d/b/a Conley Trucking (9-CA-42437, 42562; 349 NLRB No. 30) Portsmouth, OH Jan. 31, 2007. Affirming the administrative law judge's conclusions, the Board held that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Timothy Gilbert because he engaged in activities in support of union representation and to discourage other employees from engaging in these and other protected activities; and violated Section 8(a)(1) by creating the impression of surveillance of employees' union activity, inviting union supporters to leave their employment with the Respondent, and threatening employees that it would end the employer-employee relationship by selling employees the trucks and business if they chose union representation. [HTML] [PDF]

The Board found it unnecessary to address the judge's conclusion that the Respondent violated Section 8(a)(1) by threatening employees that bargaining with Teamsters Local 92 would start from zero because the Respondent's exceptions to this finding did not meet the minimum requirements of Section 102.46(b) of the Board's Rules and Regulations. It therefore adopted pro forma the judge's findings and conclusions on this violation without addressing the merits. No exceptions were filed to the judge's dismissal of allegations that the Respondent violated Section 8(a)(1) by threatening to sell its trucks and to reduce its employees' pay, and by threatening job loss and plant closure in late Oct. and early Nov. 2005.

(Members Schaumber, Kirsanow, and Walsh participated.)

Charges filed by Teamsters Local 92; complaint alleged violation of Section 8(a)(1) and (3). Hearing at New Boston, April 26 and 27, 2006. Adm. Law Judge David I. Goldman issued his decision Sept. 26, 2006.

Deposit Telephone Co., Inc. (3-CA-22391; 349 NLRB No. 21) Deposit, NY Jan. 31, 2007. Affirming the administrative law judge's decision, the Board held that the Respondent refused to recognize and bargain with Electrical Workers IBEW Local 83 as the exclusive collective-bargaining representative of its employees in violation of Section 8(a)(5) and (1) of the Act. [HTML] [PDF]

The Board agreed with the judge that there was substantial continuity of representation following the merger of Local 83's predecessor, Electrical Workers IBEW Local 1125, and seven other locals into Local 83; that a question concerning representation was not raised by the merger; and that Local 83 succeeded to the bargaining rights of Local 1125. The judge found, with Board approval, that neither the lack of notice to the Respondent's unit employees that a merger was contemplated, nor their nonparticipation in the merger process, justified the Respondent's refusal to bargain with the Union. The Board noted that the Respondent's unit employees, who were not members of Local 1125 at the time of the merger, were not included in the merger process because nonmembers do not have a right under the International Union's constitution or the Local's bylaws to participate in internal union matters such as a merger discussion or vote.

(Chairman Battista and Members Liebman and Kirsanow participated.)

Charge filed by Electrical Workers Local 83; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Binghamton on July 2, 2000. Adm. Law Judge Steven Davis issued his decision March 21, 2001.

Dow Chemical Co. (7-CA-43257, et al., 7-CB-12626; 349 NLRB No. 11) Midland, MI Jan. 29, 2007. The Board granted the General Counsel's Motion to Sever and Remand Cases 7-CA-43257, 7-CA-43388, 7-CA-43504, and 7-CA-44023 (the CA cases); remanded the cases to the Regional Director to process Steelworkers Local 12075's request to withdraw its charges against the Respondent Employer (Dow); and affirmed the administrative law judge's recommendation to dismiss Case 7-CB-12626. [HTML] [PDF]

Member Schaumber, dissenting in part, would deny the General Counsel's motion and issue a decision on the merits. He noted that the Union did not seek to withdraw its charges against Dow until May 2006 or nearly 4 years after the judge issued his decision following a multiweek hearing; and that subsequent to the judge's decision, Dow, the Union, and the General Counsel filed exceptions and extensively briefed the relevant issues. Member Schaumber wrote: "In addition to the time and expense which has already been devoted over many years by the General Counsel, the parties and now the Board, the complaint raises issues that are important in the modern workplace as employers increasingly seek to improve morale and production by empowering employees."

The complaint alleges that Dow violated Section 8(a)(2) of the Act by establishing and dominating human resource teams (HRTs) that functioned as labor organizations, and violated Section 8(a)(5) by direct dealing with employees in matters relating to the HRTs and unilaterally changing and reassigning the duties of certain employees. The judge found that Dow violated Section 8(a)(5) and (1) by unilaterally removing work traditionally performed by crew leaders represented by the Union, and reassigning that work to non-bargaining unit employees without prior notice to and affording the Union an opportunity to bargain. In support of the motion to sever, the General Counsel and Union contend that, subsequent to issuance of the judge's decision, Dow changed its practices so that its relationship to the HRTs no longer violates the Act and the position involved in the unilateral allegations no longer exists.

Chairman Battista and Member Liebman found the General Counsel's and the Union's proffered reasons sufficient to support the General Counsel's motion. They also decided that granting the motion "will effectuate the policies of the Act by conserving Board resources that would otherwise be required to decide the issues presented by the CA cases and by enabling the Board to expedite issuance of its decision in the remaining CB case."

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Steelworkers Local 12075 and Dow Chemical Co.; complaint alleged violation of Section 8(a)(1), (2), and (5) and Section 8(b)(3). Hearing over 14 days between June 5, 2001 and Feb. 26, 2002. Adm. Law Judge Martin J. Linsky issued his decision Aug. 14, 2002.

Finch, Pruyn & Co., Inc. (3-CA-23461-1, 23461-2; 349 NLRB No. 28) Glen Falls, NY Jan. 31, 2007. The Board decided that the Respondent did not violate Section 8(a)(5) and (1) of the Act by unilaterally subcontracting during an economic strike for the pulp needed for its papermaking operation, agreeing with the administrative law judge that the Respondent's subcontracting was a lawful temporary measure to maintain its operations during the strike. Accordingly, it affirmed the judge's findings that the subcontracting did not convert the economic strike to an unfair labor practice strike, and that the strikers remained economic strikers. The Board also found that the Respondent did not violate the Act by continuing its unilateral subcontracting after the strike had ended because the Union never made a request to bargain about the poststrike subcontracting. [HTML] [PDF]

Member Walsh, dissenting in part, agreed that the Respondent was not obliged to bargain with the Union over its temporary means to maintain its papermaking operation during the strike. He concluded however that the Respondent violated Section 8(a)(5) and (1) by failing to bargain over its mid-strike decision to subcontract for pulp "for an indefinite period not to terminate at the expiration of the strike," that the violation converted the economic strike to an unfair labor practice strike, and that the Respondent also violated Section 8(a)(3) and (1) when it failed to immediately reinstate the Local 18 strikers at the conclusion of the strike.

On other alleged violations, the Board reversed the judge's findings (1) that the Respondent did not violate Section 8(a)(5) and (1) by refusing to provide Local 18 with copies of the Respondent's subcontracts for pulp; and (2) that the Respondent violated Section 8(a)(5) and (1) by refusing to provide information, requested by both Local 18 and Local 155 regarding the preemployment drug testing of permanent replacement workers without offering to bargain over its asserted confidentiality concerns. The Board found that Local 18 satisfied its burden of establishing that copies of the pulp contracts were relevant and necessary to Local 18's ability to assess and enforce the unit employees' recall rights. The Union failed to demonstrate the probable relevancy of the information regarding the prehire drug and alcohol testing of applicants. The Union contended that it had safety concerns and believed that the Respondent failed to uniformly require screening.

Contrary to the judge, the Board found that the Respondent violated Section 8(a)(5) and (1) by unilaterally eliminating employee Bernard Palmer's prestrike "pcc oiler" position. It agreed however with the judge that the Respondent did not violate Section 8(a)(3) and (1) by eliminating Palmer's position or by failing to recall him to another available position.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charges filed by PACE International; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Albany, Dec. 8-12 and Dec. 16-18, 2003. Adm. Law Judge Bruce D. Rosenstein issued his decision March 26, 2004.

Fineberg Packing Co., Inc. (26-CA-20287; 349 NLRB No. 29) Memphis, TN Jan. 31, 2007. Chairman Battista and Member Schaumber reversed the administrative law judge's decision and dismissed the complaint alleging that the Respondent violated Section 8(a)(1) of the Act by discharging 32 unit employees because of their participation in a work stoppage. Member Liebman dissented. [HTML] [PDF]

In the early morning of Feb. 14, 2001, a group of employees, who were concerned about rumors of a reduction in their hours, left their work stations and walked out of the plant to wait for plant manager Richard Freudenberg. When Freudenberg arrived, employees Kathy Furlong and Billy Exum informed Freudenberg that the employees wanted to speak to him about the rumored work hour reduction. Freudenberg responded that it would be unlawful for him to meet with the employees as a group, but that he could meet with them individually. Freudenberg then ordered the employees to return to work or, alternatively, to leave the premises. In response to employee questions if they were fired, Freudenberg assured them that he was not firing anyone, and told them to come back the next day. Some employees returned to work and others left the plant. The next morning several employees attempted to return to work, but were denied access to the Respondent's premises. The following day, when the employees returned to the plant to pick up their paychecks, Freudenberg gave them separation notices, which stated that the employees had "voluntarily quit."

Chairman Battista and Member Schaumber noted that the General Counsel expressly conceded that the work stoppage was unprotected and litigated the case consistent with that position. Thus, the Respondent was neither put on notice that the nature of the work stoppage would be considered by the judge nor provided the opportunity to litigate the issue. Chairman Battista and Member Schaumber said it was not appropriate for the judge to make a finding that the work stoppage constituted protected concerted activity, and declined to adopt her finding in that regard. They also found that the evidence is insufficient to establish that the Respondent intended to condone the employees' continuation of the work stoppage after Freudenberg gave the employees the choice of returning to work or leaving.

Member Liebman agreed with the majority that the judge's finding concerning the nature of the work stoppage should be reversed and that the General Counsel apparently conceded that the work stoppage was unprotected. She would affirm however the judge's finding that the Respondent acted unlawfully in discharging the employees when they returned to work. Contrary to the majority's finding, Member Liebman decided that there was nothing ambiguous about Freudenberg's statements, which clearly demonstrate an intent to overlook the employees' misconduct and to allow them to return to work.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charge filed by Billy J. Exum; complaint alleged violation of Section 8(a)(1). Hearing at Memphis, June 17-19, 2002. Adm. Law Judge Margaret G. Brakebusch issued her decision Oct. 3, 2002.

Paulus Enterprises, Inc. d/b/a The Ford Store San Leandro (32-CA-22464-1; 349 NLRB No. 13) San Leandro, CA Jan. 29, 2007. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with East Bay Automotive Council (Machinists Local Lodge 1546, District Lodge 190; Painters Local 1176; Teamsters Local 78) (the Union) as the exclusive collective-bargaining representative of its employees in an appropriate bargaining unit by unilaterally withdrawing from and ceasing to make contributions to the Automotive Industries Pension Trust Fund as required by the parties' 2000–2005 collective-bargaining agreement, as extended. [HTML] [PDF]

The Board modified the judge's remedy and the Order to conform to the Board's usual provisions for the violations found. It noted also that there is neither an allegation nor finding that the Respondent withdrew recognition from the Union and thus, the judge's general affirmative bargaining order in paragraph 2(a) of his recommended Order is not necessary to remedy the Respondent's unlawful unilateral change. The Board modified the judge's recommended Order accordingly. See, e.g., *Mimbres Memorial Hospital*, 337 NLRB 998 fn. 2 (2002).

(Chairman Battista and Members Liebman and Kirsanow participated.)

Charge filed by East Bay Automotive Council (Machinists Local Lodge 1546, District Lodge 190; Painters Local 1176; Teamsters Local 78); complaint alleged violation of Section 8(a)(1) and (5). Hearing at Oakland, June 5-6, 2006. Adm. Law Judge Jay R. Pollack issued his decision Sept. 12, 2006.

Management Consulting, Inc. (MANCON) (5-CA-28009, et al.; 349 NLRB No. 27) Virginia Beach, VA Jan. 31, 2007. Agreeing with the administrative law judge, the Board concluded that the Respondent violated Section 8(a)(4) and (1) of the Act by giving employee Elizabeth Harrigan a poorer evaluation because she gave testimony in a Board proceeding, violated Section 8(a)(3) and (1) by discharging Robyn Strempski, and violated Section 8(a)(1) by, among others, suggesting to employees that the Respondent does not want them to participate in the Board's investigation. [HTML] [PDF]

In Aug. 1999, the Respondent provided support services to the Department of the Navy in and around Portsmouth, VA. At that time, it operated mailroom and supply and warehousing facilities at naval installations in Suffolk and St. Julien's Creek, VA.

The Board found merit in the General Counsel's exceptions and reversed the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(1) on Aug. 18, 1999, through the statements of Stuart Coon, the Respondent's project manager at the St. Julien Creek facility and an admitted supervisor and agent of the Respondent, referring to the Board's investigation of the instant unfair labor practice charges. It concluded that Coon's telling Broda that she "did not want to get involved" in the processing of the unfair labor charges was a direct admonition to her not to get involved in protected activities. Member Schaumber found it unnecessary to pass on this 8(a)(1) allegation, as he found it essentially cumulative of the other violations found.

The judge dismissed, with Board approval, allegations that the Respondent violated Section 8(a)(5) and (1) by withdrawing recognition from the Union on Sept. 30, 1998 and thereafter failing to recognize the Union and to adhere to the terms of the parties' collective-bargaining agreement when the agreement expired. The Board found it unnecessary to pass on the judge's dismissal of allegations that the Respondent violated Section 8(a)(1) through statements by Grant Morrison on about Aug. 23, 1999. Member Liebman, concurring in part, explained, among other things, her reasons for finding it unnecessary to pass on the judge's dismissal of certain 8(a)(1) allegations and for agreeing with the dismissal of the 8(a)(5) and (1) violation.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charges filed by Operating Engineers Local 147; complaint alleged violation of Section 8(a)(1), (3), and (5). Hearing at Virginia Beach, May 9-11 and June 5-8, 2000. Adm. Law Judge William G. Kocol issued his decision Nov. 30, 2000.

Park 'N Fly, Inc. (18-CA-17441, 17511; 349 NLRB No. 16) Bloomington, MN Jan. 31, 2007. The Board adopted the administrative law judge's findings that the Respondent violated Section 8(a)(1) of the Act by: Manager Daryl Anderstrom's coercive interrogation of driver Robert Wadsworth; Supervisor Elaine Pessek's coercive interrogation of Wadsworth and her threat of stricter enforcement of work rules; Pessek's coercive interrogation of driver Vince; Pessek's coercive interrogation of driver Alvin Filipek; and Pessek's threat that the Respondent would go broke if the Union came in. Member Schaumber dissented from the latter finding and found it unnecessary to pass on the judge's conclusion that Pessek's questioning of Vince was unlawful as such a finding would be cumulative and would not materially affect the remedy. [HTML] [PDF]

The Board reversed the judge's findings that the Respondent created the impression that employees' union activities were under surveillance and threatened employees that attempts to unionize would be futile by stating that the Respondent's owner would not "go for a union" and that the Union would not "do the employees any good." Member Liebman, concurring in part and dissenting in part, concurred in reversing the judge's finding that the Respondent created an impression that employees' union activities were under surveillance, but she did not rely on the

decisions cited by her colleagues. She also found that the judge appropriately relied on *Commercial Erectors, Inc.*, 342 NLRB 940, 942 fn. 4 (2004), to find that the Respondent violated Section 8(a)(1) through Pessek's statements that the owner would "not go for a union" and that the Union would not do the employees any good.

The Board affirmed the judge's dismissal of the complaint allegation that Pessek's statement to Kassera that the Respondent did not need a "damn union" and that he was nothing but a "damn troublemaker" violated Section 8(a)(1). It found, as did the judge, that the statement does not, standing alone, constitute a threat and that Pessek's calling Kassera a "damn troublemaker" was not a threat of discharge or otherwise an independent violation of the Act. Member Liebman would find that Pessek's statement that Kassera was a "damn troublemaker" violated Section 8(a)(1) "because in the context of the surrounding circumstances, the statement equated union activity with causing trouble and indicated that employees who engage in union activities are out of favor with the Respondent."

In another reversal of the judge, the Board dismissed the complaint allegations that the Respondent unlawfully discharged employee Dan Kassera, and unlawfully placed employee Troy Kirchner on 90-day probation, initially denied his request for a leave of absence without loss of benefits, and issued a warning to him.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Teamsters Local 120; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Minneapolis, May 9-11, 2005. Adm. Law Judge Mary Miller Cracraft issued her decision July 26, 2005.

Rosdev Hospitality, Secaucus, LP and La Plaza, Secaucus, LLC (22-CA-26794, 26922; 349 NLRB No. 20) Secaucus, NJ Jan. 31, 2007. The Board held, in agreement with the administrative law judge, that the Respondent, a perfectly clear successor employer to Felcor Suites, LP, d/b/a Crown Plaza Meadowlands, violated Section 8(a)(5) of the Act by unilaterally departing from its predecessor's past practice concerning leave accrual without prior notice to or consultation with UNITE HERE Local 69. Additionally, the Board affirmed the judge's finding that the Respondent violated Section 8(a)(1) when Supervisor Duran told employee Gisela Figueroa that the Respondent was going to "get rid of the union." [HTML] [PDF]

(Chairman Battista and Members Liebman and Kirsanow participated.)

Charges filed by UNITE HERE Local 69; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Newark, March 21-11 and April 5-6, 2006. Adm. Law Judge Mindy E. Landow issued her decision July 28, 2006.

Sunoco, Inc. (3-CA-25293, 25654; 349 NLRB No. 26) Tonawanda, Syracuse, and Rochester, NY Jan. 31, 2007. The Board adopted the administrative law judge's conclusions that the Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally changing its established past practice of affording bargaining unit employees an opportunity to make jet fuel deliveries prior to subcontracting such work, without giving the Atlantic Independent Union timely notice and an opportunity to bargain; and failing to provide information requested by the Union regarding the subcontracting of bargaining unit work, including the subcontracting of jet fuel deliveries. [HTML] [PDF]

Member Schaumber noted that the Respondent did not contend that its decision to subcontract jet fuel deliveries was motivated by a reason not particularly amenable to collective bargaining. He explained that even if the Respondent had advanced such an argument, it did not proffer any first-hand evidence about its reasons for deciding to subcontract jet fuel deliveries.

The Board modified the judge's recommended Order to conform to the standard remedial language and substituted a new notice to correct the judge's inadvertent reference to a general, affirmative bargaining obligation that his Order does not impose. The Board noted that to remedy the unlawful unilateral change, the judge properly issued a "limited" bargaining order requiring the Respondent to notify and, upon request, bargain with the Union before implementing any changes in wages, hours, and other terms and conditions of employment. The wording of the corresponding paragraph of the notice mistakenly reflected a general, affirmative bargaining obligation.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charges filed by Atlanta Independent Union; complaint alleged of Section 8(a)(1) and (5). Hearing at Buffalo, May 16-17, 2006. Adm. Law Judge Arthur J. Amchan issued his decision Aug. 11, 2006.

Teamsters Local 589 (19-CB-9427; 349 NLRB No. 15) Bremerton, WA Jan. 31, 2007. The Board agreed with the administrative law judge that the Respondent violated Section 8(b)(3) of the Act by failing and refusing since March 28, 2006, to execute the written collective-bargaining agreement embodying the final and binding agreement (for the employees of Jennings Distribution Inc. classified as drivers, warehousemen, salesmen, and merchandisers) reached on Feb. 21, 2006, and presented by the Employer to the Respondent for signature on or about that date. [HTML] [PDF]

The Charging Party asserted that, while it received the Respondent's brief supporting its exceptions, it did not receive a separate exceptions document. The Board found no basis for disregarding the Respondent's exceptions because the Charging Party received the Respondent's supporting brief and was able to respond fully to the Respondent's arguments and thus, that the Charging Party was not prejudiced by the alleged failure of service.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charge filed by Jennings Distribution, Inc., a Division of Marine View Beverage, Inc.; complaint alleged violation of Section 8(b)(3). Hearing at Seattle on July 25, 2006. Adm. Law Judge Gregory Z. Meyerson issued his decision Sept. 25, 2006.

Truserv Corp. (1-RD-1987; 349 NLRB No. 23) Manchester, NH Jan. 31, 2007. The Board, in a 3-2 decision involving Truserv Corporation in Manchester, New Hampshire, found that a decertification petition filed after the occurrence of alleged unfair labor practices by the employer, and prior to settlement of those charges, should not be dismissed where there has been no finding or admission that the employer actually engaged in the allegedly wrongful conduct. [HTML] [PDF]

In reaching this conclusion, Chairman Battista and Members Schaumber and Kirsanow overturned prior decisions in *Douglas-Randall, Inc.*, 320 NLRB 431 (1995), *Liberty Fabrics, Inc.*, 327 NLRB 38, 39 (1998), and *Supershuttle of Orange County*, 330 NLRB 1016, 1018-1019 (2000). Members Liebman and Walsh dissented.

In *Douglas-Randall*, the Board held that where the parties have entered into a settlement of outstanding unfair labor practice charges, and the settlement requires recognition and bargaining with the union, any petition challenging the union's majority status that is filed after the allegedly unlawful conduct, and before the settlement, must be dismissed.

Douglas-Randall involved a Board-approved settlement of pending unfair labor practice charges. In Liberty Fabrics, the Board applied the Douglas-Randall rationale to private, non-Board settlements. In Supershuttle, the Board extended the reasoning of Douglas-Randall and Liberty Fabrics to a situation where the parties' negotiation of a collective-bargaining agreement was intended to resolve unfair labor practice charges. The Board in Supershuttle held that the collective-bargaining agreement precluded a rival union's petition that was filed after the occurrence of the alleged illegal conduct, and before the parties entered into the collective-bargaining agreement. In overruling these cases, the Board returned to the doctrine previously enunciated in Passavant Health Care, 278 NLRB 483 (1986).

In reconsidering the *Douglas-Randall* decision and its progeny, the Board agreed with the reasoning of former Member Cohen in his dissent in *Douglas-Randall*, and the dissents of former Member Hurtgen in *Liberty Fabrics*, and *Supershuttle*. Like them, the Board concluded that, absent a finding of a violation of the Act, or an admission by the employer of such a violation, there is no basis for dismissing a petition based on a settlement of alleged but unproven unfair labor practices. To do so would unfairly give determinative weight to allegations of unlawful conduct and would be in derogation of employee rights under Section 7 of the Act.

In dissent, Members Liebman and Walsh disagreed with the majority's overruling of *Douglas-Randall*, *Liberty Fabrics* and *Supershuttle*, and stated they would adhere to the Board's decisions in those cases. They emphasize that the Board's task is to strike a balance between the establishment and maintenance of stable collective-bargaining relationships and employees'

freedom of choice in deciding whether they want to engage in collective bargaining and, if so, whom they wish to represent them. The dissent contends that the Board in *Douglas-Randall* and its progeny struck an appropriate balance between these interests, recognizing that the settlement of unfair labor practice allegations is a meaningful act, which bears consequences, and must be given due consideration when weighed against the right to choose whether to decertify a union.

(Full Board participated.)

USF Reddaway, Inc. (36-RC-6340; 349 NLRB No. 32) Central Point, OR Jan. 31, 2007. The Board affirmed the administrative law judge's recommendation to sustain the challenges to the ballots of Robert A. Burk and Matthew A. Heading on the basis that they are supervisors. The judge also recommended that the challenge to the ballot of William Melzer be sustained on the basis that his classification, "parts/mechanic," was not included in the stipulated bargaining unit. The Board found that the stipulation was ambiguous and that Melzer shares a community of interest with the unit employees and therefore overruled the challenge to his ballot. It remanded the proceeding to the Regional Director to open and count Melzer's ballot and to issue the appropriate certification. [HTML] [PDF]

The tally of ballots for the election held on April 18, 2006, shows 9 votes for and 8 against the Petitioner (Teamsters Local 962), with 3 determinative challenged ballots.

(Chairman Battista and Members Liebman and Walsh participated.)

United Rentals, Inc. (21-CA-36319, 36370; 349 NLRB No. 19) Pico Rivera, CA Jan. 31, 2007. The administrative law judge found, and the Board agreed, that the Respondent violated Section 8(a)(3) and (1) of the Act by suspending and discharging employee Ezequiel Zarate and Section 8(a)(1) by interrogating employee Heath James. Chairman Battista and Member Schaumber, with Member Liebman dissenting, reversed the judge's finding that the Respondent violated Section 8(a)(1) by conditioning future consideration of a job classification and wage rate adjustment for employee Fernando Lafarga on the absence of union representation. [HTML] [PDF]

About a week before a representation election, Branch Manager Kevin Imig met with Lafarga to discuss Lafarga's annual performance review. Imig explained that Lafarga would not receive a wage increase because he was already earning more than the top hourly wage for his classification, customer service employee (yardman). Lafarga said that he had been hired as a leadman painter, not as a yardman, and that he should receive an increase. Imig told Lafarga that he could do nothing about the classification at that time, but that they could talk about it later. He said the "company had some activities at the time," so he could not give an answer "right then." Imig continued, "If . . . there was nothing in between, you could come to see me and we could talk about any problems about your classification."

Chairman Battista and Member Schaumber pointed out that there is no evidence that Imig said or did anything during the review that would link consideration of Lafarga's pay adjustment to the absence of union representation. Nor did Imig state that Lafarga's pay adjustment would be provided later if the employees did not vote for Operating Engineers Local 12. Chairman Battista and Member Schaumber reasoned that even assuming arguendo that Imig's reference to "activities" could reasonably be understood as a reference to union activities, it would not make Imig's statement coercive.

Member Liebman explained that although Imig did not specifically mention the Union or the organizing campaign, his remarks could not have referred to anything else. Accordingly, she would find that Imig unlawfully refused to consider adjusting Lafarrga's classification and wage rate because of the Union's presence.

(Chairman Battista and Members Liebman and Schaumber participated.)

Charges filed by Operating Engineers Local 12; complaint alleged violation of Section 8(a)(1). Hearing at Los Angeles, Feb. 14-15, 2005. Adm. Law Judge William L. Schmidt issued decision April 29, 2005.

Wadsworth Theatre Management (31-RC-8577; 349 NLRB No. 22) Los Angeles, CA Jan. 30, 2007. The Board held, contrary to the administrative law judge, that William Merrick is an eligible voter whose ballot should be opened and counted. It directed that the Regional Director open and count Merrick's ballot, along with those of three other voters, and issue a revised tally of ballots and the appropriate certification [HTML] [PDF].

The tally of ballots for the election held on June 7, 2006, shows no votes for the Petitioner (Treasurers and Ticket Sellers Local 857, IATSE), 2 votes against representation, and 6 challenged ballots. In the absence of exceptions, the Board adopted, pro forma, the judge's recommendation to sustain the challenges to two ballots and to overrule the challenges to three ballots.

The Employer operates two professional theaters. It hired Merrick in mid-March 2006 to work in the box office for a 4-week production that ended shortly before the election. Merrick worked until late April. The judge recommended that the challenge to Merrick's ballot be sustained because he did not meet the eligibility requirements set forth in *Julliard School*, 208 NLRB 153, 155 (1974). Under *Julliard School*, voting eligibility is accorded to employees who have been employed by the Employer (1) during two productions for a total of 5 working days over a 1-year period, or (2) for at least 15 days over a 2-year period. *Julliard School*, supra, 208 NLRB at 155. The judge found Merrick was an ineligible voter under the first prong because he had not worked for the Employer for two or more productions; and that he was ineligible under the second prong because he had not worked for the Employer for 2 years.

The Board found that the appropriate formula for determining the eligibility of part-time and on-call employees is set forth in *Davison-Paxon Co.*, 185 NLRB 21, 24 (1970). Applying *Davison-Paxon*, it determined that Merrick is eligible to vote and overruled the challenge to his ballot because Merrick averaged more than 4 hours of work per week in the quarter prior to the eligibility date for the election since he worked 172 hours during that quarter. Member Liebman would also find Merrick eligible under the second prong of the formula articulated in *Julliard School*: he worked 15 days or more during the 2-year period preceding the eligibility date.

(Members Liebman, Kirsanow, and Walsh participated.)

Wisconsin Porcelain Co., Inc. (30-CA-14582; 349 NLRB No. 17) Sun Prairie, WI Jan. 31, 2007. The administrative law judge found that the Respondent violated Section 8(a)(1) of the Act by polling employees in Jan. 1999 concerning their support for the incumbent Union (Machinists District Lodge 121), making statements about conducting similar polls in the future, and interrogating employees in Feb. 2000 without affording the safeguards established in Johnnie's Poultry Co., 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965). [HTML] [PDF]

The Board agreed with the judge that the Respondent violated Section 8(a)(1) by announcing and conducting a poll among its employees in Jan. 1999 and that the Respondent, through President and CEO Scott Rose, violated Section 8(a)(1) by indicating to employees on March 11, 1999, that the Respondent would conduct future polls at will. It reversed the judge's finding that the Respondent violated Section 8(a)(1) by making similar statements on March 5, 1999. Member Schaumber found that any interference with employee rights arising from Rose's March 11 comments were isolated and de minimis and, thus, did not violate Section 8(a)(1).

Agreeing with the judge, the Board held that the Respondent violated Section 8(a)(1) by coercively interrogating employees during a series of Feb. 2000 interviews. Specifically, it affirmed the judge's finding that the Respondent coercively interrogated the employees in the first group interview on Feb. 2, 2000, by failing to give the assurances required by *Johnnie's Poultry*. Member Schaumber found it unnecessary to pass on this finding because it would be cumulative and would not affect the remedy. The Board also adopted the judge's finding that the Respondent coercively interrogated Susan Reyes on Feb. 28, 2000, by asking about her participation in union membership drives other than the 1997 drive, saying: "By questioning Reyes about her participation in other union drives, the Respondent 'exceed[ed] the necessities of the legitimate purpose by prying into other union matters"" *Johnnie's Poultry*, supra at 775.

(Chairman Battista and Members Schaumber and Walsh participated.)

Charge filed by Machinists District Lodge 121; complaint alleged violation of Section 8(a)(1). Hearing at Madison, Feb. 29-March 3, 2000. Adm. Law Judge Robert M. Schwarzbart issued his decision April 9, 2001.

LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

New York Terminals, LLC (Teamsters Local 469) Elizabeth, NJ Jan. 30, 2007. 22-CA-27518; JD(NY)-06-07, Judge Mindy E. Landow.

M & M Parkside Towers LLC (RWDSU Local 670) Brooklyn, NY Jan. 30, 2007. 29-CA-27720; JD(NY)-05-07, Judge Raymond P. Green.

RCC Fabricators, Inc. (Carpenters Metropolitan Regional Council, Eastern Pennsylvania, State of Delaware and Eastern Shore of Maryland) Southampton, NJ Jan. 30, 2007. 4-CA-31757, 4-RC-20569, 20572; JD-81-06, Judge Paul Buxbaum.

Paramus Ford, Inc. (Service Workers Local 355) Paramus, NJ Jan. 31, 2007. 22-CA-27444; JD(NY)-07-07, Judge Steven Davis.

Caterpillar, Inc. (Machinists Local 851) Joilet, IL Feb. 2, 2007. 13-CA-43506; JD-07-07, Judge Bruce D. Rosenstein.

NYP Holdings, Inc. d/b/a The New York Post (Newspaper & Mail Deliverers of New York and Vicinity) New York, NY Feb. 2, 2007. 2-CA-37729; JD(ATL)-03-07, Judge Michael A. Marcionese.

NO ANSWER TO COMPLAINT

(In the following cases, the Board granted the General Counsel's motion for summary judgment based on the Respondent's failure to file an answer to the complaint.)

Willis Roof Consulting, Inc. (Roofers Local 162) (28-CA-20852; 349 NLRB No. 24) Las Vegas, NV Jan. 31, 2007. [HTML] [PDF]

In re David M. Kelsey (5-AD-62; 349 NLRB No. 31) Jan. 31, 2007. [HTML] [PDF]

Lake States Industrial Services, Inc. (Operating Engineers Local 139) (30-CA-17480; 349 NLRB No. 25) Milwaukee, WI Jan. 31, 2007. [HTML] [PDF]

LIST OF UNPUBLISHED BOARD DECISIONS AND ORDERS IN REPRESENTATION CASES

(In the following cases, the Board considered exceptions to and adopted Reports of Regional Directors or Hearing Officers)

DECISION AND DIRECTION OF SECOND ELECTION

Safeway Transportation, Inc., Detroit, MI, 7-RC-22950, Jan. 31, 2007 (Members Liebman, Kirsanow, and Walsh)

Flagstaff Medical Center, Inc., Flagstaff, AZ, 28-RC-6448, Jan. 31, 2007 (Members Schaumber, Kirsanow, and Walsh)

(In the following cases, the Board adopted Reports of Regional Directors or Hearing Officers in the absence of exceptions)

DECISION AND CERTIFICATION OF REPRESENTATIVE

Critical Care Transport, Inc., Columbus, OH, 9-RC-18093, Feb. 1, 2007 (Members Schaumber, Kirsanow, and Walsh)

(In the following cases, the Board denied requests for review of Decisions and Directions of Elections (D&DE) and Decisions and Orders (D&O) of Regional Directors)

Haven Health Center of Windham, LLC, Willimantic, CT, 34-RC-2134, Jan. 29, 2007 (Members Liebman, Schaumber, and Kirsanow)

The California Mushroom Farm, Ventura, CA, 31-RC-8621, Jan. 31, 2007 (Members Liebman, Schaumber, and Kirsanow)

Compass Group USA, Inc. d/b/a Eurest Dining Services, Kansas, MO and Charlotte, NC, 17-UC-254, Jan. 31, 2007, (Members Liebman, Schaumber, and Kirsanow)

Rochelle Waste Disposal, LLC, Rochelle, IL, 33-RC-5002, Jan. 31, 2007 (Members Liebman and Kirsanow; Member Schaumber dissenting)

Miscellaneous Board Orders

DECISION AND ORDER [remanding proceeding to Regional Director]

First Student, Inc., Newtown and Rushland, PA, 4-RC-21221, Jan. 30, 2007 (Members Schaumber and Kirsanow; Member Liebman dissenting)

ORDER [granting Union Involved's (Teamsters Local 115) request to cancel the election]

First Student, Inc., Rushland, PA, 4-RC-21221, Jan. 29, 2007 (Members Schaumber and Kirsanow; Member Liebman dissenting)

CERTIFICATION OF REPRESENTATIVE AS BONA FIDE UNDER SECTION 7(B) OF THE FAIR LABOR STANDARDS ACT OF 1938

Village of Brookfield, Brookfield, IL, 13-WH-9, Feb. 1, 2007
